MEMORANDUM

SUBJECT: revisions to part 71 package

FROM: Candace Carraway

TO: Art Fraas, Troy Hillier

DATE: April 29, 1996

Attached are several marked up pages that reflect revisions to the part 71 preamble, and two pages that reflect a change in the regulatory language.

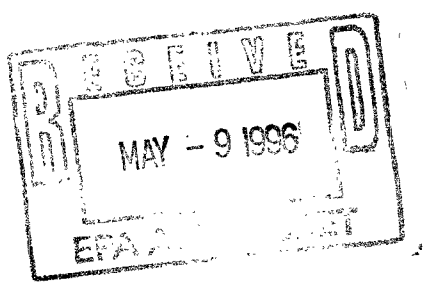
First, based on our revised ICR and RIA for part 71, we have inserted revised costs estimates for the program under the PRA analysis portion of the preamble, and we simplified the Unfunded Mandates discussion.

Second, we have revised the regulatory language and preamble discussion of one aspect of the major source definition to be more narrow and consistent with the way the term is used in PSD/NSR applicability determinations.

Third, we have taken out a few preamble sentences that deal with insignificant activities to make the flexibility provided as broad as what we indicated was available in white paper 2.

Fourth, there is a non-substantive chart in the supplementary information section of the preamble that complies with a new EPA requirement to identify the types of entities affected by the package.

If you have any concerns about these changes, please call me as soon as possible at (919) 541-3189. If I don't hear from you, I will forward a version of the complete package that incorporates these changes on May 1, 1996 which is the day on which the extended review period should terminate.



"significant" and therefore, subject to OMB review and the requirements of the Executive Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of $100 million or more, adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan program or the rights and obligation of recipients thereof;

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order."

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant" regulatory action. As such, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

The estimated annualized cost of implementing the part 71 program is ~~$[illegible]~~ 19.8 million to the Federal government and ~~$18.3~~ 18.1 million to respondents, for a total of ~~$101~~ 379 million which reflects industry's total expected costs of complying with the program. Since any costs incurred by the Agency in administering

owners or operators of sources subject to the program to submit a timely and complete permit application and under §§ 71.6(a) and (c) which require that permits include requirements related to recordkeeping and reporting. As provided in 42 U.S.C. 7661b(e), sources may assert a business confidentiality claim for the information collected under section 114(c) of the Act.

The annual average burden on sources for the collection of information is approximately ~~2.6 million~~ 677,719 hours per year, or ~~471~~ 329 hours per source. The annual cost for the collection of information to respondents is ~~$48.3~~ 18.1 million per year, assuming the part 71 program is in effect in 8 States. There is no burden for State and local agencies. The annual cost to the Federal government is ~~$52.8~~ 19.8 million (assuming part 71 programs are delegated), which is recovered from sources through permit fees. Thus, the total annual cost to sources would be ~~$101~~ 37.9 million. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information;

Suggested language for preamble re: unfunded mandates, to replace the second, third, fourth and fifth paragraphs under that section of the draft final preamble

Regarding the private sector, the EPA estimates that the total cost of complying with the part 71 program would be $ 37.9 million per year, assuming that the part 71 program is in effect in 8 States. The estimated costs of collection of information would be $18.1 million per year, and $ 19.8 million would be collected in fees.

For these reasons, EPA believes that the total direct costs to industry under today's action would not exceed $100 million in any one year. Therefore, the Agency concludes that it is not required by Section 202 of the Unfunded Mandates Reform Act of 1995 to provide a written statement to accompany this regulatory action because promulgation of the rule would not result in the expenditure by State, local and Tribal governments, in the aggregate or by the private sector, of $100,000,000 or more in any one year.

found on p. 39 of the preamble

4. Major source

The proposed part 71 rule contained a definition of "major source" that was based on the proposed change to the term contained in the August 1994 proposed revisions to part 70. Since publication of the part 71 proposal, EPA has also proposed additional changes to the term in the August 1995 supplemental proposal for parts 70 and 71. The EPA is currently in the process of reviewing, evaluating and developing positions in response to comments on this very important term and other issues raised in the August 1995 proposal. Consequently, EPA is not yet prepared to promulgate part 71 in general, or the major source definition in particular, as based on the August 1994, April 1995 or August 1995 proposals. The only exception to this approach is in regard to source categories for which fugitive emissions are to be counted in determining whether a source is a major source under section 302 of the Act.

Consistent with PSD and nonattainment NSR, current part 70 requires the counting of fugitive emissions from source categories which have been listed pursuant to section 302(j) in major source applicability determinations. See the definition of "major source" at 40 CFR § 70.2. The one difference, however, between the list of source categories under PSD and nonattainment NSR and current part 70 is in regard to the 27th category of sources that are required to count fugitive emissions. In parts 51 and 52, the 27th category is stated as follows:

> Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

In current part 70, the 27th category reads as follows:

> All other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category;

As can be seen from the above, one of the principal differences between these two paragraphs is the date of August 7, 1980, which is specified in the PSD and nonattainment NSR regulations, but is absent from the current part 70 regulation. The result of this difference is that part 70 literally requires sources to count fugitives even where those sources are not required to do so in determining whether they are major for purposes of PSD or nonattainment NSR. As stated in the preamble to the August 1994 part 70 proposal, EPA acknowledges that it did not follow the procedural steps necessary under section 302(j) to expand the scope of sources in this category for which fugitives must be counted in part 70 major source determinations. See, memorandum of June 2, 1995, entitled "EPA Reconsideration of Application of Collocation Rules to Unlisted Sources of Fugitive Emissions for Purposes of Title V Permitting," from Lydia Wegman, Deputy Director, Office of Air Quality Planning and Standards, to Regional Air Directors. Instead of perpetuating this problem by following this aspect of current part 70, and even though the Agency is not yet ready to finalize the approach taken in the August 1995 supplemental proposal for parts 70 and 71, EPA believes that an appropriate interim solution is to finalize this category similar to how it was proposed in the April 1995 part 71 proposal and consistent with the provisions in the PSD and nonattainment NSR regulations. As a result, the 27th category

will read as follows:

> Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

Use of the above language best ensures that, until EPA is prepared to finalize part 70's proposed revisions, there will be no discrepancy between the treatment of fugitive emissions under PSD and nonattainment NSR and the corresponding provision in this phase I part 71 rule. This language further ensures that sources which are considered major sources under PSD and nonattainment NSR are also major sources under part 71. This consistency is compelled by section 501(2) which requires any stationary source to be considered major under title V if it is a major source under section 112 or a major stationary source under section 302 or part D of title I.

It is important to remember that EPA has proposed additional modifications to the list of source categories, including this 27th category, in the August 1995 proposal for parts 70 and 71. However, as EPA is currently in the process of reviewing and evaluating comments regarding these revisions, EPA cannot at this time finalize any of these proposed modifications.

The EPA stresses that the definition of major source in today's rulemaking does not constitute a decision to reject other proposed changes to the term contained in the recent proposals. Rather, EPA expects the Phase II part 71 rulemaking to make whatever changes to the term are necessary in order to maintain harmonization with part 70, if the part 70 definition of major source is ultimately revised as the Agency intends. In the

meantime, however, in order to avoid delay in fulfilling the Agency's responsibilities under title V, and in order to avoid repeating a procedural mistake that occurred in the development of the first part 70 rule, EPA has concluded, in response to the commenters, that at this point it is most reasonable to promulgate a definition that is consistent with the major source definition contained in the current part 70 rule, except for the 27th category of sources listed pursuant to section 302(j). As EPA has already told States that they may receive interim approval of their State programs even if they do not literally match with current part 70's 27th category, due to EPA's concession that the Agency did not take the procedural steps necessary in part 70 to constitute a § 302(j) rulemaking, EPA believes it is reasonable to take this limited departure from part 70. The EPA will respond to specific comments on the major source definition as proposed in April 1995 and August 1995 in the context of finalizing the Phase II part 71 rule.

(vii) Primary copper smelters;

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or nitric acid plants;

(x) Petroleum refineries;

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(xiv) Sulfur recovery plants;

(xv) Carbon black plants (furnace process);

(xvi) Primary lead smelters;

(xvii) Fuel conversion plants;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil-fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input; or

(xxvii) ~~All~~ Any other stationary source category ~~for~~ which, as of August 7, 1980, is being regulated ~~by a standard promulgated~~ under section 111 or 112 of the Act; ~~but~~

~~only with respect to those air pollutants that have been regulated for that category~~;

(3) A major stationary source as defined in part D of title I of the Act, including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tpy or more in areas classified as "serious," 25 tpy or more in areas classified as "severe," and 10 tpy or more in areas classified as "extreme;" except that the references in this paragraph (3)(i) to 100, 50, 25, and 10 tpy of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f)(1) or (2) of the Act, that requirements under section 182(f) of the Act do not apply;

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tpy or more of volatile organic compounds;

(iii) For carbon monoxide nonattainment areas:

(A) That are classified as "serious," and

(B) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tpy or more of carbon monoxide; and

activities for treatment as insignificant when such activities are subject to applicable requirements. The EPA believes that no change to the final rule is necessary to implement this new interpretation.

Industry commenters were particularly concerned that EPA's interpretation that proposed § 71.5(g) would not allow activities with applicable requirements to be eligible for insignificant treatment would render the insignificant activity and emissions level provisions meaningless because few sources would be eligible for streamlined treatment in the application.

The EPA now believes that it was overly broad in stating that emission units were precluded from eligibility as "insignificant" if such units would be subject to applicable requirements. As discussed below, EPA believes there are circumstances in which an emission unit or activity can be treated as "insignificant" under a Federal operating permits program, even if it is subject to an applicable requirement. However, a title V application must still contain information needed to determine the applicability of or to impose any applicable requirement or any required fee and a permit must still meet the requirements of § 71.6 for all emission units subject to applicable requirements, including those eligible for insignificant treatment.

Both §§ 71.5(c) and 71.5(c)(3)(i) require sufficient information to verify the requirements applicable to the source and to collect appropriate permit fees. The EPA interprets

section 504(a) of the Act and § 71.6(a)(1) to require title V permits to contain all requirements applicable to the source, including those requirements applicable to activities eligible for insignificant treatment. Furthermore, EPA interprets § 71.6(c)(1) to require each permit to contain "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit" for activities eligible for insignificant treatment. The fact that an emission unit may emit only small quantities of pollutants does not provide a basis for exempting it from the fundamental statutory requirement that the permit specifically include, and ensure compliance with, all applicable requirements.

This means that some of the information required by sections 71.5(c)(3) through (9) may be needed in the permit application for insignificant activities in order for the permitting authority to draft an adequate operating permit. As an example, where an insignificant activity is not in compliance with an applicable requirement at the time of permit issuance, the permit application would need to contain a compliance plan, including a compliance schedule, for achieving compliance with the applicable requirement. As another example, if a source has some insignificant activities within a category that are subject to an applicable requirement and some within that same category that are not subject to that applicable requirement because the applicability criteria for the applicable requirement are

different from the applicability criteria for insignificant activities, the permit application would generally be required to include sufficient information on the insignificant activity for the permitting authority to determine which units are subject to the applicable requirement and to include that applicable requirement in the permit for the subject insignificant activity. The EPA believes that a part 71 permit application may simply list the applicable requirements that apply to insignificant activities generally, rather than requiring the permit application to explicitly identify which insignificant activities are subject to which applicable requirements. The permitting authority would then issue a permit imposing the applicable requirements in the permit, but not specifically identifying which insignificant activities are subject to those applicable requirements. In such a case, however, EPA believes that § 71.6(f) would not authorize the permitting authority to grant a permit shield to insignificant activities because there would have been no determination in the permitting process that certain insignificant activities were or were not subject to certain applicable requirements. (For a more detailed discussion, see the white paper and ~~60 FR 62992 (December 8, 1995).~~ the proposed interim approval and proposed notice of correction for the State of Washington's part 70 program, 60 FR 50166 (September 28, 1995).)

b. Insignificant Activity Lists. Section 70.5(c), in part, allows States to develop lists of insignificant activities and emission levels that need not be included in applications and requires activities (or equipment) exempted due to size or production rate to be listed in the application. State part 70

Regulated entities. Entities potentially regulated by this action are major sources, affected sources under title IV of the Act (acid rain sources), solid waste incineration units required to obtain a permit under section 129 of the Act, and those area sources subject to a standard under section 111 or 112 of the Act which have not been exempted or deferred from title V permitting requirements. Regulated categories and entities include:

| Category | Examples of regulated entities |
|---|---|
| Industry | major sources under title I or section 112 of the Act; affected sources under title IV of the Act (acid rain sources); solid waste incineration units required to obtain a permit under section 129 of the Act; area sources subject to New Source Performance Standards or Maximum Achievable Control Technology standards that are not exempted or deferred from permitting requirements under title V |

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria in § 71.3(a) of the rule. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding "FOR FURTHER INFORMATION CONTACT" section or the EPA Regional Office that is administering the part 71 permit program for the State or area in which the relevant source or facility is located.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
"……to protect human health and to safeguard the natural environment"

# DOCUMENT SUBMISSION

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Suggested language for preamble re: unfunded mandates, to replace the second, third, fourth and fifth paragraphs under that section of the draft final preamble

Regarding the private sector, the EPA estimates that the maximum potential total cost of complying with the part 71 program would be $101 million per year, assuming that the part 71 program is in effect in 8 States and that all compliance costs are costs that would not otherwise be incurred. The estimated costs of collection of information would be $48.3 million per year, and $52.8 million would be collected in fees. The EPA believes these figures overestimate the costs that will be incurred under the program because sources are already incurring compliance costs under State programs.

In all but one of the States that EPA believes are likely to have part 71 programs, sources have begun to pay fees, collect information and prepare permit applications for their State operating permits programs, which were adopted to satisfy the requirements of 40 CFR part 70 (but which currently lack EPA approval). These costs incurred by industry prior to the effective date of today's rule are included in the baseline costs against which the impact of the part 71 rule is measured and are not direct costs within the meaning of the UMRA. Furthermore, most of these costs incurred by sources under State operating permits programs would not be repeated under the part 71 program. This is because much of the work sources have performed in order to prepare for implementation of State programs will be transferable to the part 71 program.

The $101 million estimate is an annual cost figure for eight part 71 programs. The EPA believes that it is very unlikely that it would administer that many programs for a year or more. The EPA expects that most part 71 programs will be in effect less than a year, until such time as the State's part 70 program is approved. Where part 71 programs are in effect for a short time, many sources will not have been required to commit any significant resources to compliance with the part 71 program.

For these reasons, EPA believes that the total direct costs to industry under today's action would not exceed $100 million in any one year. Therefore, the Agency concludes that it is not required by Section 202 of the UMRA of 1995 to provide a written statement to accompany this regulatory action because promulgation of the rule would not result in the expenditure by State, local and Tribal governments, in the aggregate or by the private sector, of $100,000,000 or more in any one year.

Suggested language for preamble re: unfunded mandates, to replace the second, third, fourth and fifth paragraphs under that section of the draft final preamble

Regarding the private sector, the EPA estimates that the total cost of collection of information would be $48.3 million per year, assuming that the part 71 program is in effect in 8 States. For two reasons, the EPA believes this figure overestimates the direct costs of the program, as defined in the UMRA.

First, the EPA believes that most States that will have part 71 programs would have already adopted legislation and regulations to satisfy the requirements of 40 CFR part 70, but that their programs would not have been approved by EPA. For the most part sources in those States would be subject to information collection requirements (e.g., permit application requirements) as a matter of State law that are similar to part 71 requirements. Under the part 71 program, the State application forms could be used for part 71 purposes, provided the form complied with part 71 requirements. The EPA believes that a source that had submitted a complete State application would need to provide little additional information for the part 71 program. Thus, most of the information collection costs incurred by sources under State operating permits programs would not be repeated under the part 71 program.

Second, the $48.3 million estimate ~~assumes~~ that EPA would administer eight part 71 programs for a ~~two~~ year period. The EPA believes that it is very unlikely that it would administer that many programs for such an extended time period. The EPA expects that most part 71 programs will be in effect less than a year, until such time as the State's part 70 program is approved.

The EPA estimates that $52.8 million would be collected in fees if all 8 programs were delegated and EPA imposed fees in each program. However, EPA would not collect part 71 fees if the State was granted full delegation of the program and if fees imposed as a matter of State law on title V sources were adequate to fund the part 71 program. The EPA expects that this will be the case in nearly all part 71 programs, resulting in no fees beyond those imposed by the States. Assuming that EPA does not delegate authority to administer one part 71 program, EPA estimates that it would collect fees of no more than $9 million.

For these reasons, EPA believes that the total direct costs to industry under today's action would not exceed $100 million in any one year. Therefore, the Agency concludes that it is not required by Section 202 of the UMRA of 1995 to provide a written statement to accompany this proposed regulatory action because promulgation of the rule would not result in the expenditure by State, local and Tribal governments, in the aggregate or by the private sector, of $100,000,000 or more in any one year.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
RESEARCH TRIANGLE PARK, NC 27711

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

April 22, 1996

Mr. Arthur G. Fraas
Chief, Natural Resources Branch
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Room 10202
Washington, DC 20503

Dear Mr. Fraas:

I would like to request that OMB's review of the Federal Operating Permits Program of the Clean Air Act--Part 71 (OMB Number 2060-0336/SAN 3369) under E.O. 12866 be extended for an additional 7 working days from the date of this letter. This action was submitted to OMB on January 22, 1996 for a 90-day review under E.O. 12866.

We are requesting this extension due to delays encountered in finalizing language in the rule.

Sincerely,

Steven J. Hitte
Chief
Operating Permits Group

cc: Ron Evans
Lydia Wegman
James Weigold